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Supreme Court, U.S.
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In The Supreme Court of the United States

JEANNE E. CALDWELL,

Petitioner,

v.

ROY L. CALDWELL, PH.D., in his official capacity as Director of the University Of California Museum Of Paleontology; DAVID LINDBERG, in his official capacity as Chair of the Integrative Biology Department of the University of California-Berkeley; and MICHAEL D. PIBURN, in his official capacity as Program Director for the National Science Foundation,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Jeanne Caldwell, a California resident, is the mother of three children who study science in public school, and is herself an active participant in public debates on science education. California authors a website whose ostensible purpose is to educate the public on science. Caldwell uses the website for that purpose. The website proclaims California's religious position on a theological debate within Christianity, and describes Caldwell's religious position as "divisive" and "incorrect." California's website is endorsed by the United States. Does Caldwell have standing to bring an Establishment Clause claim, or are government websites immune from Establishment Clause claims?

PARTIES TO THE PROCEEDINGS

Petitioner Jeanne E. Caldwell was the plaintiff-appellant in the court below. Respondents Roy L. Caldwell, in his official capacity as Director of the University Of California Museum Of Paleontology; David Lindberg, in his official capacity as Chair of the Integrative Biology Department of the University of California-Berkeley; and Michael D. Piburn, in his official capacity as Program Director for the National Science Foundation were the defendants-appellees below. There are no other parties.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	1
STATEMENT OF THE CASE	2
SUMMARY OF THE ARGUMENT	9
ARGUMENT	13
A. This is a case of first impression	13
1. A growing body of cases involves claims arising from conduct on internet websites	13
2. None of the growing body of cases involves a citizen claim for an Establishment Clause violation on a website	14
B. The issue in this case will be repeated	15
C. Formulation of a test is in the public interest	17
1. There has been no clear judicial statement of how the test for article III standing applies to a government website	17

TABLE OF CONTENTS – Continued

Page

2. A direct stake in the outcome should be the focus of standing in the context of government websites 24

CONCLUSION 26

APPENDIX

October 3, 2008 Opinion of the Court of Appeals for the Ninth Circuit ..... App. 1

March 13, 2006 District Court Order Granting Motion to Strike and Motion to Dismiss ..... App. 18

March 20, 2006 District Court Opinion and Order Granting Defendants' Motion to Dismiss and Vacating Hearing Date ..... App. 38

October 14, 2005 Exhibit 2 of Complaint filed in the District Court ..... App. 51

TABLE OF AUTHORITIES

Page

CASES

ACLU of Georgia v. Rabun County, 698 F.2d 1098 (11th Cir. 1983).....16, 19

ACLU of Illinois v. City of St. Charles, 794 F.2d 265 (7th Cir. 1986) 16, 19

Buono v. Norton, 371 F.3d 543 (9th Cir. 1994) ....*passim*

Caldwell v. Caldwell, 420 F. Supp. 2d 1102 (N.D. Cal 2006).....1

Caldwell v. Caldwell, 545 F.3d 1126 (9th Cir. 2008) 1

Doremus v. Board of Education, 342 U.S. 429, 72 S.Ct. 394, 96 L.Ed. 475 (1952).....

Ellis v. City of La Mesa, 990 F.2d 1518 (9th Cir. 1993) 16, 18, 19

Hewitt v. Joyner, 940 F.2d 1561 (9th Cir. 1991).....18, 19

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).....17, 21, 23

School District of Abington v. Schempp, 374 U.S. 203 (1963).....23

Separation of Church and State v. City of Eugene, 93 F.3d 617 (9th Cir. 1996) 16, 18

Sierra Club v. Morton, 405 U.S. 727 (1972) 24

Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982).....17, 18, 21, 23, 24

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

US Const., Article III, Section 2 ..... *passim*

US Const., First Amendment 1

STATUTES

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1983 1

OPINIONS BELOW

The opinion of the district court is reported at 420 F. Supp. 2d 1102 (N.D. Cal. 2006). (App. 18) The Ninth Circuit's opinion affirming the decision of the district court is reported at 545 F.3d 1126. (App. 1) Both opinions are published.

JURISDICTION

The opinion of the Court of Appeals (App. 1) was filed on October 3, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant portion of section 2 of Article III provides:

> "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States. . . ."

The First Amendment states in pertinent part as follows:

> "Congress shall make no law respecting an establishment of religion. . . ."

42 U.S.C. § 1983 states in part:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage,

> of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ."

STATEMENT OF THE CASE

Jeanne Caldwell filed a complaint which challenges a section of a website published by the University of California entitled *Understanding Evolution*.[1] The section in question involves a dispute within the faith community relative to origins. This debate revolves around whether the account of creation in Genesis is to be interpreted in a figurative or a literal manner. A condensed and simplified view of the competing ideas is as follows: those who believe in a literal version of the Bible generally assert that the biblical account of life's origins is incompatible with Darwin's theory of evolution; those who interpret the Bible in a literary manner (e.g., allegorically) find the creation story in Genesis compatible with Darwin's theory of evolution. The underlying religious debate informs positions in the public policy debate over evolution education. Jeanne Caldwell reads the Bible

[1] http://evolution.berkeley.edu

literally. The state operated website has described the dispute and has identified itself with the opposing theological position. Because persons acting under color of law have taken sides in what is essentially a dispute within the faith community, a cause of action for a violation of the Establishment Clause has been alleged in the complaint.

The complaint alleges the following. The University of California is an agency of the State of California. The National Science Foundation is an agency of the United States of America. The National Center for Science Education is a religious advocacy organization. The University of California joined the National Center for Science Education, a religious advocacy organization, in applying to the National Science Foundation for a grant to create an internet website on evolution aimed at combating "[t]he influence of a minority of vocal Christian fundamentalists" in the religious debate over evolution education.

After a peer-review process, the National Science Foundation awarded a grant to the University of California which, to date, has provided over $530,000 in federal funding to the University of California for the development of the proposed internet website. The grant application acknowledges that "[e]volution is the most controversial subject in science, and has been so in American public education since the 1920s."

Pursuant to the grant, the University of California, in conjunction with the National Center for

Science Education, created an internet website called *Understanding Evolution*, which includes a statement informing its users that the website was created pursuant to a grant from the National Science Foundation. Initially, *Understanding Evolution* was aimed primarily at K-12 school teachers (although it was always accessible by the public). However, in 2005 (before the commencement of this lawsuit), *Understanding Evolution* was remodeled and has since been promoted to the general public by the University of California as "Your One-Stop Source for Information on Evolution."

In furtherance of the University of California's primary goal of combating "a minority of vocal Christian fundamentalists," *Understanding Evolution* includes a webpage stating the University of California's official position in the religious debate over the compatibility of Darwin's theory of evolution with the biblical account of origins. The title of the webpage proclaims the University of California's stance in this religious debate: *Misconception: "Evolution and Religion Are Incompatible."* When the complaint was filed, the *Evolution and Religion Are Incompatible* webpage stated:

> ***"Misconception: 'Evolution and Religion Are Incompatible'***
>
> **"Response:**
>
> "Religion and science (evolution) are very different things. In science (as in science class),

only natural causes are used to explain natural phenomena, while religion deals with beliefs that are beyond the natural world.

"The misconception that one always has to choose between science and religion is divisive. Most Christian and Jewish religious groups have no conflict with the theory of evolution or other scientific findings. In fact, many religious people, including theologians, feel that a deeper understanding of nature actually enriches their faith. Moreover, in the scientific community there are thousands of scientists who are devoutly religious and also accept evolution."[2]

In response to this lawsuit, the text of the *Evolution and Religion Are Incompatible* webpage was revised to read:

"***Misconception: 'Evolution and Religion Are Incompatible'***

"Response:

"Religion and science (evolution) are very different things. In science, only natural causes are used to explain natural phenomena, while religion deals with beliefs that are beyond the natural world.

"The misconception that one always has to choose between science and religion is incorrect. Of course, some religious beliefs explicitly

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[2] Exhibit 2 of the Complaint (App. 4).

> contradict science (e.g., the belief that the world and all life on it was created in six literal days); however, most religious groups have no conflict with the theory of evolution or other scientific findings. In fact, many religious people, including theologians, feel that a deeper understanding of nature actually enriches their faith. Moreover, in the scientific community there are thousands of scientists who are devoutly religious and also accept evolution."[3]

The *Misconception: Evolution and Religion Are Incompatible* webpage communicates an undeniably religious message that is reinforced visually by a cartoon drawing of a robe-clad cleric holding a Bible engraved with a Latin cross shaking hands with a scientist holding a fossil, both of whom are smiling.[4] The *Misconception: Evolution and Religion Are Incompatible* webpage also contains a jump-site link to a webpage on the National Center for Science Education website entitled *Voices for Evolution*,[5] containing doctrinal statements by Christian denominations and other religious organizations that accept the canon that the biblical account of origins is compatible with Darwin's evolutionary account of origins. The religious doctrines, provided by the jump-cite, all fall on the government's chosen side of this quintessentially

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[3] http://evolution.berkeley.edu/evosite/misconceps/IVAandreligion.shtml

[4] Exhibit 2 of the Complaint (App. 4).

[5] *Id.*

religious debate on origins. For purposes of this litigation, Jeanne Caldwell contends that both the revised and original versions of the *Misconception: Evolution and Religion Are Incompatible* webpage violate the Establishment Clause, in the context of the University of California's stated purpose of creating a website to combat the "minority of vocal Christian fundamentalists" in the religious debate over evolution education.

Jeanne Caldwell, who lives in Roseville, California, approximately 90 miles from the University of California's Museum of Paleontology, in Berkeley, California, is the mother of three children who attend public school in California. She is an active participant in the religious debate over whether the biblical account of origins is compatible with Darwin's evolutionary account of origins, and in the accompanying public debate over how Darwin's evolutionary account of origins should be taught in our public schools. Caldwell, a biblical literalist, believes that the biblical account of origins is incompatible with Darwin's evolutionary account of origins. Consistent with her religious belief, Caldwell is of the opinion that children in the public schools should not be taught that the Christian account of origins is compatible with Darwin's evolutionary account of evolution. Rather, she holds the opinion that the State of California and the United States should remain neutral on the religious question of whether the biblical account of origins is compatible with Darwin's account of evolution.

Caldwell uses *Understanding Evolution* for its intended purpose of being a "One-Stop Source for Information on Evolution." One of her motivations for using *Understanding Evolution* is so that she will be an informed participant in the public debate over how evolution ought to be taught in her local public schools. But Caldwell cannot use the entire *Understanding Evolution* website without reading the University of California's doctrinal statement on the religious question of whether the biblical account of origins is compatible with Darwin's evolutionary account of origins. Caldwell finds the University of California's statement of this religious doctrine on *Understanding Evolution* deeply offensive, since it conflicts with her own religious beliefs on this question. Caldwell is made to feel like an outsider by the pejorative statement in the original edition of the *Misconception: Evolution and Religion Are Incompatible* webpage that her religious belief is considered "divisive," and therefore disfavored, by the State of California. Caldwell is equally offended and made to feel like an outsider by the State of California's statement on the revised edition of the *Misconception: Evolution and Religion Are Incompatible* webpage that her belief that the biblical account of evolution is incompatible with Darwin's account of evolution is "incorrect." Also troubling to her, as a reasonable observer with knowledge of the history of *Understanding Evolution* and the National Science Foundation grant approval process, is Caldwell's discovery that the primary purpose of the entire *Understanding Evolution* website was to combat the "influence of . . .

Christian fundamentalists" such as herself in the religious and public policy debates over how Darwin's evolutionary account of evolution should be taught in her childrens' public schools. Caldwell is also troubled that the United States, acting under the auspices of the National Science Foundation, endorses *Understanding Evolution*, with knowledge, and allegedly rigorous peer review, of its religious content and purpose.

Because Caldwell cannot use the entire website unreservedly, she filed suit in federal court pursuant to 42 U.S.C. § 1983 for violation of the Establishment Clause. The District Court dismissed the complaint without leave to amend based on a lack of Article III standing and the Court of Appeals for the Ninth Circuit affirmed. Caldwell has timely filed this Petition.

SUMMARY OF THE ARGUMENT

Increasingly, governments communicate with their citizens through websites on the internet. Such government websites are rapidly replacing older forms of communications such as books, pamphlets, postal letters, radio broadcasts, television telecasts, and in-person conversations as the primary means used by state governments and the federal government to communicate with their citizens. It is to be expected that this migration of governmental communications is being accompanied by a corresponding

migration of Constitutional violations from traditional locations to websites.

Thus far, jurisprudence has not kept up with technology. There is currently no guidance from this court as to how Article III and prudential standing rules apply to Establishment Clause violations on government websites. This case is a prime example of the new era of Establishment Clause claims and the urgent need for such guidance.

Understanding Evolution is an internet website owned, authored and published by the University of California, with a statement of endorsement by the National Science Foundation. Promoted to the public as "Your One-Stop Source for Information on Evolution," *Understanding Evolution* contains a webpage entitled *Evolution and Religion Are Incompatible* which states the University of California's position on the religious debate over whether the biblical account of origins is compatible with Darwin's evolutionary account of origins. The webpage is illustrated by a drawing of a robe-clad cleric holding a Bible with a Latin cross on the cover shaking hands with a scientist holding a fossil.

The Petitioner, Jeanne E. Caldwell, is a Christian and mother of three school-aged children who believes in a literal interpretation of the Bible, and also believes that the Bible's account of origins by supernatural creation is incompatible with Charles Darwin's evolutionary account of origins by natural selection. Caldwell uses *Understanding Evolution* for

its intended purpose to educate herself about evolution. While using *Understanding Evolution*, Jeanne Caldwell encounters the *Evolution and Religion Are Incompatible* webpage. The original edition of the *Evolution and Religion Are Incompatible* webpage labeled Caldwell's belief about this religious question as "divisive," while a revised edition of the *Evolution and Religion Are Incompatible* webpage labels Caldwell's religious belief as "incorrect." Caldwell is offended by the University of California's proclamation of a religious doctrine on evolution that is contrary to her own religious belief, on a public website publicly endorsed by the federal governemant. And the State of California's denouncement of her religious belief as "divisive" and "incorrect" makes Caldwell feel like a political outsider.

Caldwell respectfully submits that she has alleged sufficient injury in fact to constitute Article III and prudential standing to pursue her Establishment Clause claim against the University of California and the National Science Foundation.

However, the Ninth Circuit affirmed the district court's dismissal of Caldwell's lawsuit on the grounds of lack of standing. The Ninth Circuit, the only appellate court to rule on this issue, has adopted an antiquated standing rule that ignores the reality that a citizen's viewing of an offending governmental religious message on a computer screen in her home is an equally direct and physical interaction with the message as a citizen viewing a Latin cross in a government park. The Ninth Circuit reasoned that

Caldwell lacks standing because (1) the religious statements on the website are not sufficiently *permanent*, and (2) Caldwell has not demonstrated a sufficient *connection* to the website. The first part of the Ninth Circuit's standing rule for constitutional violations on government websites, based on their changeable nature, would render all government websites immune from legal challenge by citizens. Moreover, this case also shows how unworkable a *permanence* element is, since the governmental religious message in this case has already been present on the *Understanding Evolution* website for three years. If three years is not sufficiently *permanent* for standing purposes, what length of time would be? As a corollary, would this mean that a citizen who observes a violation of the Establishment Clause in any setting must wait a number of years while the violation achieves *permanence* before she will be granted standing to challenge the violation in court?

The second part of the Ninth Circuit's standing rule for constitutional violations on government websites embroils courts in the inherently arbitrary task of making a qualitative comparison of various citizens' reasons for visiting and using a governmental resource for its intended purpose. This case proves the arbitrariness of such a test. The Ninth Circuit has divined that a resident mother of three children who, from her home computer, uses a website produced by her state, for its intended purpose of teaching citizens about science, does not have a sufficient interest to confer standing. In contrast, the Ninth Circuit's

opinion asserts that this parent's interest is not equal to that of a non-resident retired federal employee, visiting a federal preserve in another state, who was found to have standing to challenge a cross located in a remote section of the preserve.

The Petition should be granted so that this Court can provide direction and articulate a workable test for how the traditional standing rules apply to Establishment Clause claims arising from violations that occur on government websites.

ARGUMENT

There are three reasons that review should be granted as follows:

1. This is a case of first impression.
2. Cases that implicate the Establishment Clause on government owned websites will occur in the future.
3. Formulation of a test is in the public interest.

A. This is a case of first impression.

1. A growing body of cases involves claims arising from conduct on internet websites.

Increasingly, websites are replacing buildings as the place where citizens interact with their governments.

State-run websites disseminate notices, informational pamphlets and governmental messages the way that print publications, mail service and in-person communications once did. As local, state and federal agencies routinely produce and maintain websites intended for public use, there can be no reasonable expectation of immunity from liability. Although most cases do not have state actors as parties, according to the *Internet Library of Law and Court Decisions*, there are 590 reported cases that involve internet liability in the federal courts.[6]

2. None of the growing body of cases involves a citizen claim for an Establishment Clause violation on a website.

It is to be expected that, as there is a shift from physical government offices to the internet, an inevitable corresponding rise in requests for intervention from the courts to address constitutional claims will result. Although there is a growing docket of cases involving the internet, none other than the lower court decisions in this case have as of yet addressed Article III standing in the context of the Establishment Clause. This case merits review because it presents the threshold issue of Article III and prudential standing for a citizen to pursue a court claim when an Establishment Clause violation occurs on a

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[6] http://www.internetlibrary.com (last visited November 19, 2008)

government website, rather than in a government office, park, or more traditional form of communication.

B. The issue in this case will be repeated.

The Petition should be granted because this issue will continue to be repeated in the courts. A variety of circumstances will raise colorable claims of violations of the Establishment Clause. For example, thousands of religious items are located in local, state, and federal buildings and parks throughout the country. H.R. Res. 888, 110th Cong. (Jan. 23, 2008). Many are currently featured on government websites. By way of example, the Colonial National Historical Park has a section with a Latin Cross called Cape Henry Memorial Cross. Photographs of the cross are displayed on the National Park Service website.[7] Indeed, approximately seventy displays of the Ten Commandments adorn parks throughout the country, in addition to scores of Decalogue displays in courthouses.[8] The Goddess of Justice also stands watch over hundreds of courthouses.[9] Not surprisingly, photographs of these religious displays are routinely posted on government websites.

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[7] http://www.nps.gov/came/

[8] http://www.atheistactivist.org/Decalogues.html

[9] http://www.members.tripod.com/mdean/justice.html

Allowing the Ninth Circuit's decision to stand without review would make government websites an Establishment Clause free zone. Such a rule represents a radical departure from the standing rules and underlying policies that apply to all government resources other than websites.

A couple of examples will bring the imprudence of such a rule into focus. Hypothetically, a courthouse could display the Decalogue on its webpage – with an express religious purpose in doing so – though it may have been enjoined from having such a display on the wall. Would the memorial cross cases[10] become moot if the crosses were physically removed from the park itself but virtually erected on the park website instead? Put simply, is there a real property requirement to have standing to bring an Establishment Clause challenge? Absent resolution of that issue, this type of case will be repeated.

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[10] For example, *Buono v. Norton*, 371 F.3d 543 (9th Cir. 1994); *Separation of Church and State v. City of Eugene*, 93 F.3d 617 (9th Cir. 1996); *Ellis v. City of La Mesa*, 990 F.2d 1518 (9th Cir. 1993); *ACLU of Illinois v. City of St. Charles*, 794 F.2d 265 (7th Cir. 1986); and *ACLU of Georgia v. Rabun County*, 698 F.2d 1098 (11th Cir. 1983).

C. Formulation of a test is in the public interest.

1. There has been no clear judicial statement of how the test for Article III standing applies to a government website.

Beyond the facts of this case, the question of whether citizens have standing to challenge an Establishment Clause violation on a website is an important public issue that needs resolution. More than a quarter century ago, the *Valley Forge* court did not contemplate a society in which much – perhaps even most – interaction between the government and its citizens occurs in a virtual world. It is in the public interest for this Court to develop a workable test which avoids the two extremes in which either the whole world has standing or no one has standing. Granting this Petition will provide such a test.

The fundamental elements of Article III standing are well-established. A party has Article III standing if she suffers an "injury in fact," the injury is fairly traceable to the challenged conduct, and the injury is likely to be redressed by a favorable judicial decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). In the Establishment Clause context, this Court found no Article III standing in *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982) because plaintiffs: (1) never visited the government property in question, (2) merely read about the land transfer in a news release, and (3) had only a generalized grievance similar to all taxpayers. *Valley Forge*, 454 U.S.

464, 469 (1982). Plaintiffs in *Valley Forge* never used the government resource in question and never came into direct contact with a religious message by one acting under color of law while using that government resource. *Id.* In *Valley Forge*, the governmental action being challenged was not the communication of a religious message by the state on government property; it was the transfer of ownership in that governmental property. This Court has never announced what standing rules apply when the governmental action being challenged as violative of the Establishment Clause is the government's communication of a religious message on government-owned property.

A line of cases from the Ninth Circuit has attempted to apply *Valley Forge* to Establishment Clause cases challenging Latin crosses on government-owned property. In those cases, the Ninth Circuit has found that a plaintiff can allege sufficient "injury in fact" to confer standing to pursue an Establishment Clause claim if he comes into direct contact with a religious symbol such as a Latin cross, on land owned by the government, communicating a religious message that he finds offensive. *Buono v. Norton*, 371 F.3d 543 (9th Cir. 1994); *Separation of Church and State v. City of Eugene*, 93 F.3d 617, 619, fn. 2 (9th Cir. 1996); *Ellis v. City of La Mesa*, 990 F.2d 1518, 1523 (9th Cir. 1993); *Hewitt v. Joyner*, 940 F.2d 1561 (9th Cir. 1991), *cert. denied*, 502 U.S. 1073, 112 S.Ct. 969, 117 L.Ed.2d 134 (1992). The *Ellis* court encapsulates the reasoning when it states: "We . . . follow[ ] other circuits in holding that 'when a plaintiff alleges

that the government has unconstitutionally aligned itself with religion, standing may be based on finding that the plaintiff has been injured due to his or her not being able to freely use public areas.'" *Ellis*, 990 F.2d at 1523 (citing *Hewitt*, 940 F.2d at 1564 citing *ACLU of Illinois v. City of St. Charles*, 794 F.2d 265 (7th Cir. 1986), *cert. denied*, 479 U.S. 961, 107 S.Ct. 458, 93 L.Ed.2d 403 (1986) and *ACLU of Georgia v. Rabun County*, 698 F.2d 1098 (11th Cir. 1983)).

Caldwell submits that the presence of the University of California's religious statements and accompanying religious graphics, including a Latin cross on a Bible, on its *Understanding Evolution* website, prevents her from freely using the website without coming into direct contact with an unwanted governmental religious message. Thus, Caldwell submits that her contact with an unwanted religious message on the government-owned and authored *Understanding Evolution* website is equivalent to a citizen's contact with an unwanted religious message such as a Latin cross on government-owned land. However, the Ninth Circuit reasoned that the analysis from the cross line of cases is not applicable to a citizen's use of a government website:

> "Caldwell's situation does not fit neatly into a place already staked out along the continuum of Establishment Clause standing. She is neither so removed from the conduct challenged as the plaintiffs were in *Valley Forge*, nor so close as the plaintiff was in *Vasquez*. Her connection to the writing on the website

> is more tenuous than Buono's to the Preserve where the offending symbol was a Latin cross that was permanently installed on top of a hill, while her complaint is more abstract and her contact less forced than Vasquez's." (Opinion at 14089 and 14090).

The Ninth Circuit appears to have conceded that Caldwell's contact with the religious message on *Understanding Evolution* was direct and offensive to her, and that she is unable to unreservedly use *Understanding Evolution* without encountering the unwanted religious message. However, the Ninth Circuit denied Caldwell standing to challenge this unwanted governmental religious message on the grounds that her "connection to the writing on the website is more tenuous than Buono's to the Preserve where the offending symbol was a Latin cross that was permanently installed on a top of a hill. . . ." *Id.* This portion of the Ninth Circuit's standing test for government websites is confusing and of little guidance to future cases, since it appears to conflate two concepts: Caldwell's *connection* to the governmental religious message; and the *permanence* of the religious symbol on the governmental website. The Ninth Circuit fails to explain how the permanence of the six-foot cross in *Buono* makes the religious message conveyed by the cross more offensive to a citizen than an express statement of government endorsement of a particular religious doctrine accompanied by a Latin cross published on a government website. If the Ninth Circuit's *permanence* test is to be measured in temporal terms, Caldwell would point out that

offensive versions of the governmental religious message have now been present on *Understanding Evolution* for more than three years. Moreover, if the Ninth Circuit's *permanence* element is to be measured temporally, its decision in this case fails to explain what quantity of years would be considered *permanent*. On the other hand, if, by *permanence*, the Ninth Circuit is referring to the fact that a message on a website can be modified, then, by definition, the Ninth Circuit's standing rule announced in this case means that no citizen would ever be able to challenge the constitutionality of a governmental endorsement of religion on a website. In other words, a violation of the Establishment Clause must involve something tangible such as real property or physical objects.

The second part of the Ninth Circuit's standing test applied in this case – her *connection* to the website's content – involves a qualitative assessment of Caldwell's motive for using the *Understanding Evolution* website in comparison with Buono's motive for using the vast Mojave Desert preserve in *Buono*. Caldwell respectfully submits that this second prong of the Ninth Circuit's standing test announced in this case veers far beyond the elements of standing announced by this court in *Valley Forge* and *Lujan*. In both of those cases, standing was rejected because the citizens had not alleged that they were actually using the governmental resource where the alleged violation took place, and they had not alleged direct exposure to the governmental activity constituting the violation. *Valley Forge*, 454 U.S. at 469, *Lujan*, 504

U.S. 564. In contrast, Caldwell alleges that she actually uses the government property in question, and that she actually comes into direct contact with the offensive governmental action.

However, the Ninth Circuit now adds a novel new test for standing in this case – that the citizen must allege a reason for using the governmental resource that the court deems compelling. The Ninth Circuit's decision in this case demonstrates the inherently arbitrary nature of such an inquiry.

The Ninth Circuit identifies Buono's motive for using the Mojave Desert Preserve as his status as a former Assistant Superintendent for the Preserve. *Buono*, 371 F.3d 446. The Ninth Circuit does not explain how this work history gives Buono a constitutionally relevant reason for using the Mojave Desert Preserve in general, nor does it explain any reason for Buono to use the precise acre of the 1.6 million acre Preserve on which the Latin cross is visible in particular. *Buono*, 371 F.3d 449. The appellate court then identifies Caldwell's interest in using the *Understanding Evolution* website as her interest in "informed participation as a citizen in school board meetings, debates and elections, especially with respect to selection of instructional materials and how teachers teach the theory of evolution in biology classes in the public school." Opinion at 14083. Caldwell's motive for using the government website is deemed by the Ninth Circuit to be not sufficiently compelling to give her standing. Moreover, the concurring opinion in the Ninth Circuit emphasizes that

the webpage Caldwell complains about is one webpage among over 840 pages. Since she can take evasive action to avoid the religious message, she thus lacks standing to challenge the website. Opinion at 14092, Fletcher, concur. In contrast, Buono was deemed to have a right to use the entire 1.6 million acres of the Mojave Desert Preserve, even though the Latin cross was only visible from a portion of one of those acres. *Buono*, 371 F.3d 449. The fact that Buono could have visited 1.59 million acres of the Preserve (99.4%) without coming into contact with the Latin cross was deemed irrelevant to whether he had standing to sue over the cross.

The Ninth Circuit further clouds the waters by discussing cases involving non-voluntary direct contact with unwanted religious messages, i.e., public school Bible reading. Opinion at 14090 citing *School District of Abington v. Schempp,* 374 U.S. 203 (1963), and *Doremus v. Board of Education,* 342 U.S. 429 (1952). Besides the fact that those cases are entirely off point, the cross line of cases, discussed above, prove that involuntary use of a governmental resource has never been thought to be an element of standing under *Valley Forge* and *Lujan* before this case.

2. A direct stake in the outcome should be the focus of standing in the context of government websites.

In formulating a test for Article III standing in the context of Establishment Clause violations via government activities on the internet, the challenge is to narrow standing such that the courts do not become venues for a "debating society." *Valley Forge*, 454 U.S. at 472. As this Court has stated, it is important that the complainant have a "direct stake in the outcome." *Valley Forge*, 454 U.S. at 472 (citing *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972)). When the Ninth Circuit determined that Caldwell had a closer interest in the outcome than the plaintiffs in *Valley Forge*, yet declined to follow the cross line of cases, the reasoning appears to be that personal contact with government endorsement of particular religious views is actionable when it occurs in the physical world but not in the virtual world. That is a position which is problematic in a society which the preferred means of conducting the business of government is now online.

The Ninth Circuit's answer to this novel legal question of what is a "direct stake" in an Establishment Clause challenge is a bright line rule that physical contact with an offending display is necessary. As discussed above, this physical contact is referred to by the appellate court as "permanence." Opinion at 14089 and 14090. Such a bright line rule for Article III standing should be rejected as antiquated. It is Caldwell's position that the Court of

Appeal's position is inadequate for a world that has changed substantially since the courts first began to wrestle with the concept of standing within the Establishment Clause context.

It is important to note what Caldwell is not seeking. She is not seeking a change in the requirements for Article III standing. Rather, she is asking that the Court grant certiorari as means to fashion a test that gives guidance to state actors that deal with the public online, and the judiciary, as to how Article III requirements relate to government activity on the internet.

Caldwell's position is that a test can be crafted in which standing, relative to the internet, is based upon whether the complainant is engaging in an online activity for which the website is intended to operate, and, whether the complainant is able to use the website unreservedly without encountering an offensive religious symbol or message that is inconsistent with the Establishment Clause. Such a citizen would have the direct stake in the outcome of the litigation that meets the prerequisites of standing under Article III, as well as under prudential standing principles.

CONCLUSION

One of the remarkable aspects of the U.S. Constitution is that the drafters created an instrument that sets a broad workable structure for operating a government. Applying the cases or controversies requirement of Article III standing to the emerging claims involving violations of the Establishment Clause on government websites is a challenge that this Court should meet. Thus, the petition for writ of certiorari should be granted.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Jeanne E. Caldwell,

Plaintiff-Appellant,

v.

Roy L. Caldwell, in his official capacity as Director of the University of California Museum of Paleontology; David Lindberg in his official capacity as Chair of the Integrative Biology Department of the University of California-Berkeley; Michael D. Piburn, in his official capacity as Program Director for the National Science Foundation.

Defendants-Appellees.

No. 06-15771

D.C. No.
CV-05-04166-PJH

OPINION

Appeal from the United States District Court
for the Northern District of California
Phyllis J. Hamilton, District Judge, Presiding

Argued and Submitted
May 14, 2008 – San Francisco, California

Filed October 3, 2008

Before: Betty B. Fletcher and Pamela Ann Rymer, Circuit Judges, and Kevin Thomas Duffy,* District Judge.

Opinion by Judge Rymer;
Concurrence by Judge B. Fletcher

COUNSEL

Larry Caldwell, Quality Science Education for All, Roseville, California, Kevin T. Snider (argued), Pacific Justice Institute, Sacramento, California, for the plaintiff-appellant.

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Robert M. Loeb, Lowell V. Sturgill Jr. (argued), United States Department of Justice, Civil Division, Washington, D.C., for defendant-appellee David Campbell.

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* The Honorable Kevin Thomas Duffy, Senior United States District Judge for the Southern District of New York, sitting by designation.

OPINION

RYMER, Circuit Judge:

We must decide whether Jeanne E. Caldwell, who asserts an interest in being informed about how teachers teach the theory of evolution in biology classes, has standing to pursue an Establishment Clause claim arising out of her offense at the discussion of religious views on the "Understanding Evolution" website created and maintained by the University of California Museum of Paleontology and funded in part by the National Science Foundation. She avers that the website endorses beliefs which hold that religion is compatible with evolutionary theory and disapproves beliefs, such as her own, that are to the contrary, thereby exposing her to government-endorsed religious messages and making her feel like an outsider. In a published opinion, the district court concluded that Caldwell's allegations state only a generalized grievance insufficient for injury in fact, and dismissed the complaint. *Caldwell v. Caldwell*, 420 F.Supp.2d 1102, 1007 [sic] (N.D. Cal. 2006). We also conclude that the harm asserted by Caldwell to her interest in being informed about the teaching of evolutionary theory is too generalized and remote to confer standing against the University of California faculty who administer the website and develop its content on behalf of the Museum of Paleontology. Caldwell's complaint against the Director of the National Science Foundation has become moot since her appeal was taken. Therefore, we affirm.

I

Caldwell's complaint pursuant to 42 U.S.C. § 1983 alleges that she is the parent of children in the California public schools, and is actively involved in elections and debates about the selection of instructional materials for science classes. She uses the website, "Understanding Evolution," to participate as an informed citizen in these elections, debates, and processes.

Roy L. Caldwell, Director of the University of California's (UC) Museum of Paleontology, and David Lindberg, Chair of the Integrative Biology Department at UC Berkeley, developed the website's content and administer it.[1] They applied for a grant from the National Science Foundation (NSF)[2] to create a website "to provide professional development opportunities to broaden and deepen the disciplinary knowledge and pedagogical skills of teachers, thus improving their ability to deliver rich and challenging science, mathematics and technology education to all students." NSF awarded the grant on May 10, 2001.

The website consists of some 840 pages. Its stated purpose is:

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[1] Professor Lindberg and the Museum Director are sued in their official capacities as University employees, so we refer to them collectively as "UC."

[2] Michael D. Piburn was the NSF Program Director at the time. As he was sued in his official capacity, we substitute the current Program Director, David Campbell.

> Understanding Evolution is a non-commercial, education website, teaching the science and history of evolutionary biology. This site is here to help you understand what evolution is, how it works, how it factors into your life, how research in evolutionary biology is performed, and how ideas in this area have changed over time.

http://evolution.berkeley.edu. The website has a number of subsites, one of which is "Understanding Evolution for Teachers." This subsite in turn is organized into a number of sections, including one called "Misconceptions" that addresses misconceptions about evolution and the mechanisms of evolution. Caldwell's complaint focuses on a page titled "Misconception: 'Evolution and Religion are Incompatible.'" http://evolution.berkeley.edu/evosite/misconceps/IVAandreligion.shtml. Beneath text elaborating the point[3] is

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[3] The page has been edited over time, but in the version attached to the complaint, opened with text that stated in full:

> **Misconception: "Evolution and religion are incompatible."**
>
> **Response:** Religion and science (evolution) are very different things. In science (as in science class), only natural causes are used to explain natural phenomena, while religion deals with beliefs that are beyond the natural world.
>
> The misconception that one has to choose between science and religion is divisive. Most Christian and Jewish religious groups have no conflict with the theory of evolution or other scientific findings. In fact, many religious people, including theologians, feel that a deeper understanding of nature actually enriches

(Continued on following page)

a cartoon that depicts a smiling scientist in a lab coat holding a fossil skull shaking hands with a smiling cleric in a collar holding a book marked with a small cross.

Caldwell alleges that the site endorses the religious viewpoint that religious beliefs are limited to the spiritual world; that the theory of evolution is not in conflict with properly understood Christian religious beliefs; that the "Misconception" page links to a National Center for Science Education (NCSE) web page that includes statements by many religious organizations in support of the endorsed position that most Christian and Jewish religious groups have no conflict with the theory of evolution; and that the site seeks to proselytize public school students and the public to adopt these viewpoints. The complaint avers that Caldwell is offended by the government's endorsement of religions and religious denominations when she visits the site; that people such as she who believe that their religious belief is incompatible with evolutionary theory are made to feel like outsiders by the State of California and the United States; and that she has been exposed to the government-endorsed religious messages to her harm because UC has opened the site to the general public. Caldwell requests an injunction restraining publication of the website and a judgment declaring that inclusion of

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their faith. Moreover, in the scientific community, there are thousands of scientists who are devoutly religious and also accept evolution.

the religious and anti-religious materials in the Understanding Evolution website is unconstitutional.

UC and NSF moved to dismiss for lack of standing. The district court held that Caldwell failed to make out taxpayer standing with respect to both the federal and state parties, an issue that is not appealed. Relying on *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982), the court also found that Caldwell's allegations constitute no more than the generalized grievances of one who observes government conduct with which she disagrees. Accordingly, it dismissed the complaint on the ground that Caldwell has not shown injury in fact.

Meanwhile, Caldwell had moved at oral argument for leave to amend her complaint to include additional allegations that the Understanding Evolution website is aimed at the general public as well as at K-12 teachers, and that UC has expressly invited members of the general public to visit and use the website. Asked to clarify its dismissal order in this respect, the court explained that it denied leave to amend because the additional allegations would have no bearing on whether Caldwell adequately alleged cognizable injury in fact given that the court's decision was based on the understanding that UC's website was always open to the public.

Caldwell timely appealed.

II

We first consider the status of Caldwell's action against NSF because mootness has been suggested. Paragraph 16 of the complaint alleges that the grant "runs through October 31, 2006," and ¶ 19 avers: "The grant started on April 1, 2001, and expires on October 31, 2006." The government represents that this is so, i.e., the grant in fact expired on October 31, 2006, and that no funding has occurred since then or is likely to occur in the future. *See Chandler v. Miller*, 520 U.S. 305, 313 n.2 (1997). Caldwell does not seriously contend otherwise. For these reasons, the appeal as to NSF is moot.

III

Next we address Caldwell's contention that she could have added amendments to her complaint that would have sufficiently pleaded injury in fact, as well as meritorious Establishment Clause claims. There is no issue as to the latter because the merits were neither reached by the district court nor raised on appeal. As to standing, the proffered amendments would be meaningless because ¶ 26 of the complaint already alleges that UC opened the Understanding Evolution website to the public. Both the district court, and we, take it as true for purposes of whether dismissal is proper that, as pled, the website is public.

IV

The heart of Caldwell's position is that *Valley Forge,* embraced as the controlling authority by UC and the district court, is inapposite and that the "cross" cases, exemplified by *Buono v. Norton,* 371 F.3d 543 (9th Cir. 2004), provide the more apt analogy. *See also Separation of Church and State Comm. v. City of Eugene,* 93 F.3d 617 (9th Cir. 1996) (*SCSC*); *Ellis v. City of La Mesa,* 990 F.2d 1518 (9th Cir. 1993). Caldwell submits that, like the plaintiffs in those cases, she also came into direct contact with a religious symbol on property owned by the government which she finds offensive; and that, just as the inability of plaintiffs in those cases freely to use public land sufficed as injury in fact, so too should it suffice that she is inhibited from freely using a government resource without running into religious symbols and theological statements which offend her.

A party has Article III standing if she suffers an "injury in fact," the injury is fairly traceable to the challenged conduct, and the injury is likely to be redressed by a favorable judicial decision. *Buono,* 371 F.3d at 546; *see Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992). Even so, "the Court has refrained from adjudicating 'abstract questions of wide public significance' which amount to 'generalized grievances,' pervasively shared and most appropriately addressed in the representative branches." *Valley Forge,* 454 U.S. at 474-75 (quoting *Warth v. Seldin,* 422 U.S. 490, 499-500 (1975)).

In *Valley Forge,* Americans United for Separation of Church and State along with four of its employees, based in the Washington, D.C. area, learned through a news release that surplus government property had been transferred to Valley Forge Christian College in Chester County, Pennsylvania. They challenged the transfer on Establishment Clause grounds. The Court held that Americans United were without standing as taxpayers, and had not established standing by virtue of an injury in fact. Elaborating the requirement for injury in fact, the Court observed that it is not enough for a party to claim that the Establishment Clause has been violated; "[s]uch claims amount to little more than attempts to employ a federal court as a forum in which to air . . . generalized grievances about the conduct of government." *Id.* at 483 (internal quotations and citations omitted). Thus, the complaint of Americans United was deficient because "[t]hey fail to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms." *Id.* at 485-86 (emphasis in original).[4]

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[4] Having so concluded, the Court reiterated that standing may be predicated on noneconomic injury, citing *United States v. SCRAP,* 412 U.S. 669 (1973). *SCRAP* recognized that plaintiffs who used natural resources for recreational and aesthetic

(Continued on following page)

In *Buono,* the plaintiff, a retired employee of the Park Service who had been Assistant Superintendent of the Mojave National Preserve and regularly visited it, complained that a Latin cross atop Sunrise Rock violated the Establishment Clause and was offensive to him. He regarded the cross as offensive because it was on federal property – not because of the cross as such – and the district court found that Buono would tend to avoid Sunrise Rock as long as the cross remained standing. We held that *Valley Forge* "drew a distinction between abstract grievances and personal injuries, not ideological and religious beliefs," 371 F.3d at 547, and that Buono's inhibition from freely using the Preserve sufficed as injury in fact[5] and constituted "personal injury suffered . . . *as a consequence* of the alleged constitutional error." *Id.* (emphasis in original) (quoting *Valley Forge,* 454 U.S. at 485).

Since *Buono,* we have also considered standing to pursue an Establishment Clause challenge in the

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purposes that would be adversely affected by a municipal fee had standing, as they alleged specific and perceptible harm that distinguished them from other citizens who had not used these resources. In *Valley Forge,* however, the Court "simply [could not] see . . . *injury* of *any* kind, economic or otherwise." *Id.* at 486 & n.23 (emphasis in original).

[5] We had so held before in *SCSC,* 93 F.3d at 619 n.2, and *Ellis,* 990 F.2d at 1523. In each, parties offended by the presence of a cross on government property alleged that the cross prevented them from unreservedly using the area where the cross was installed. *See Buono,* 371 F.3d at 547 (citing both cases).

context of a government seal. In *Vasquez v. Los Angeles County,* a county employee was forced to have daily contact with a county seal from which a cross had been removed and which he regarded, for this reason, as an offensive anti-religious symbol. 487 F.3d 1246, 1249 (9th Cir. 2007). We held that Vasquez had standing even though he had taken no affirmative steps to avoid areas where the symbol was located; we did not think it necessary to require a change of behavior – in his case, to quit his job – in order to vindicate spiritual harm from unwelcome direct contact with an allegedly offensive religious (or anti-religious) symbol. Nor did we think Vasquez's contact with the symbol too tenuous, indirect, or abstract to give rise to Article III standing given that he held himself out as a member of the community where the seal was located, as someone forced into frequent regular contact with it, and as someone directly affected by unwelcome direct contact with a symbol that was pervasively on display. We thought *Valley Forge* distinguishable in this respect, because the plaintiffs there were physically removed from the allegedly unconstitutional conduct, and because Vasquez had alleged more than "a mere abstract objection" to removal of the cross from the county seal. *Id.* at 1251 (quoting *Suhre v. Haywood County,* 131 F.3d 1083, 1086 (4th Cir. 1997)).

Caldwell's situation does not fit neatly into a place already staked out along the continuum of Establishment Clause standing. She is neither so removed from the conduct challenged as the plaintiffs

were in *Valley Forge,* nor so close as the plaintiff was in *Vasquez.* Her connection to the writing on the website is more tenuous than Buono's to the Preserve where the offending symbol was a Latin cross that was permanently installed on a top of a hill, while her complaint is more abstract and her contact less forced than Vasquez's.

It is instructive to compare *School District of Abington v. Schempp,* 374 U.S. 203 (1963), and *Doremus v. Board of Education,* 342 U.S. 429 (1952), as the Supreme Court did in *Valley Forge*. 454 U.S. at 486 n.22. *Schempp* is the source of the rule which informed our decision in the seal case, that unwelcome direct contact with an allegedly offensive religious or anti-religious symbol, suffices for Article III standing. *See Vasquez,* 487 F.3d at 1251-53. In *Schempp,* children enrolled in public school together with their parents objected to a Bible reading in the classroom that was mandated by state law. The Court found the interests asserted sufficient for standing because these plaintiffs were "directly affected by the laws and practices against which their complaints are directed." *Schempp,* 374 U.S. at 224 n.9. This contrasts with *Doremus,* in which the same issues were raised but in which parents lost standing to sue when their children were graduated. 342 U.S. at 432-33. *See also Elk Grove Unified School Dist. v. Newdow,* 542 U.S. 1, 12-18 (2004) (holding that parent whose custodial rights were unclear lacked prudential standing to pursue an Establishment Clause claim aimed at recitation of the Pledge of Allegiance in his

daughter's classroom). As the Court explained in *Valley Forge,*"[t]he plaintiffs in *Schempp* had standing, not because their complaint rested on the Establishment Clause – for as *Doremus* demonstrated, that is insufficient – but because impressionable school children were subjected to unwelcome religious exercises or were forced to assume special burdens to avoid them." 454 U.S. at 486 n.22.

We conclude that Caldwell's asserted interest – informed participation as a citizen in school board meetings, debates, and elections, especially with respect to selection of instructional materials and how teachers teach the theory of evolution in biology classes in the public schools – is not sufficiently differentiated and direct to confer standing on her to challenge the University of California's treatment of religious and anti-religious views on evolution. An interest in informed participation in public discourse is one we hold in common as citizens in a democracy. While people inside and outside the academy may (and do) take different views in the ongoing debate over whether science and religion may coexist, Caldwell's offense is no more than an "abstract objection" to how the University's website presents the subject. The court must refrain from becoming "a judicial version [ ] of college debating forums." *Vasquez,* 487 F.3d at 1251 (quoting *Valley Forge,* 454 U.S. at 473). That she is the parent of school-age children makes her position no less remote, for her connection to the University of California website is not similar to the relationship in *Schempp* between parents whose

children are directly exposed to unwelcome religious exercises in the classroom and the school district. Accordingly, we believe there is too slight a connection between Caldwell's generalized grievance, and the government conduct about which she complains, to sustain her standing to proceed.

AFFIRMED.

FLETCHER, Circuit Judge, concurring:

I concur in the majority opinion. I write separately to elaborate more fully why Caldwell lacks standing.

Caldwell's injury is limited to "the psychological consequence presumably produced by observation of conduct with which one disagrees." *Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 485 (1982). Caldwell does not allege that her children's school has incorporated the offending views expressed on the UE website into its science curriculum or that her children's biology teacher articulated them in response to a student's question. Thus, there is no allegation that Caldwell's children or Caldwell herself were "directly affected" by the offensive content of the UE website. *Cf. School District of Abington v. Schempp*, 374 U.S. 203, 224 n.9 (1963) (holding that public school pupils and their parents who objected to Bible reading in school had standing because they were "directly

affected by the laws and practices against which their complaints [were] directed").

Caldwell also does not allege that her contact with the offensive views expressed on the UE website was "frequent and regular" or "unwelcome." *Vasquez v. Los Angeles County*, 487 F.3d 1246, 1251, 1252 (9th Cir. 2007). There is no allegation that Caldwell had any reason to visit the offending web page more than once. *Cf. id.* at 1248, 1249, 1253 (holding that county resident and employee who had daily, unwelcome contact with allegedly anti-religious county seal had standing). Nor did the single offending web page prevent Caldwell from freely using the rest of the UE website: the site comprises approximately 840 pages, each of which can be viewed without having first viewed the offending page. *Cf. Buono v. Norton*, 371 F.3d 543, 547 (9th Cir. 2004) (holding that plaintiff who was "unable to freely use" the area of the Mojave National Preserve around a Latin cross because of the government's allegedly unconstitutional actions had standing (internal quotation marks, editorial marks, and citation omitted)).

Moreover, while "[w]e have repeatedly held that inability to unreservedly use public land suffices as injury-in-fact," *id.* (citation omitted), I am not persuaded that inability unreservedly to use a government-run website necessarily also suffices as injury-in-fact. Accessing and leaving a website is quick and easy, and the alleged offense from the content of one page out of 840 that one need not read or tarry over is fleeting at best. While in certain cases the inability to

access a government-run website due to allegedly unconstitutional content may well confer standing, I conclude that Caldwell's injury is too de minimis to satisfy the standing doctrine's core aim of "improving judicial decision-making by ensuring that there is a specific controversy before the court and that there is an advocate with sufficient personal concern to effectively litigate the matter." *Vasquez*, 487 F.3d at 1250 (internal quotation marks, editorial marks, and citation omitted).

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JEANNE E. CALDWELL
Plaintiff,
v.
ROY L. CALDWELL, PH.D, et al.,
Defendants.
/

No. C 05-4166 PJH

ORDER GRANTING MOTION TO STRIKE AND MOTION TO DISMISS

(Filed Mar. 13, 2006)

Defendants' motion to dismiss and motion to strike portions of plaintiff's complaint came on for hearing before this court on February 8, 2006. Plaintiff Jeanne E. Caldwell appeared through her counsel, Larry Caldwell, Kevin T. Snider, and Matthew McReynolds. Defendants Roy L. Caldwell and David Lindberg (collectively "defendants") appeared through their counsel, William J. Carroll and Christopher M. Patti. Having read the papers filed in conjunction with the motion and carefully considered the arguments and the relevant legal authority, and good cause appearing, the court hereby GRANTS defendants' motions, for the reasons stated at the hearing and as follows.

BACKGROUND

Plaintiff is the mother of three and a resident of Placer County, California. Two of her children currently attend public school in Placer County.

Defendants occupy posts at the University of California at Berkeley ("UC Berkeley"): defendant Caldwell is the Director of the University of California Museum of Paleontology, and defendant Linburg is the Chair of the Integrative Biology Department of the University of California at Berkeley.[1]

On October 14, 2005, plaintiff filed the instant complaint, in which she takes issue with a website published by the University of California, http://evolution.berkeley.edu (the "Understanding Evolution" website). The website is part of a larger website maintained by the UC Berkeley Museum of Paleontology. Its purpose is to educate teachers and the general public about the science and history of evolutionary biology. *See* Def. Op. Br. at 3:13-16.

Plaintiff's complaint alleges that the Understanding Evolution website contains certain web pages that operate to impermissibly endorse, advance and proselytize certain religious beliefs. In particular, plaintiff alleges that the website pages endorse the following: (1) the religious doctrine that religion and religious beliefs are limited to the spiritual and supernatural world; (2) the religious doctrine that the theory of evolution is not in conflict with properly understood Christian or Jewish religious beliefs; (3) content contained on a link from the website to the National Center for Science Education ("NCSE"),

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[1] Defendant Michael Piburn, Program Director for the National Science Foundation, is not a party to this motion.

which contains seventeen doctrinal statements on the theory of evolution in support of the website's theory that evolution is not in conflict with many Christian and Jewish religions; and (4) the religious beliefs and religious viewpoints advocated by the NCSE, including the seventeen statements just referenced. *See* Complaint for Declaratory and Injunctive Relief and Nominal Damages for Violation of the Establishment Clause of the First Amendment to the United States Constitution ("Complaint"), ¶ 24.

As a result of this endorsement, plaintiff alleges that the government violates the First Amendment Establishment Clause by setting up a preference for certain religious groups over others – i.e., for those groups who are not in conflict with evolution over those who are. *See id.* at ¶ 29. Plaintiff asserts this violation has caused her to suffer injury, because she is "offended" when she views the website, and made to feel like an "outsider." *Id.* at ¶ 26.

Defendants have moved to dismiss plaintiff's complaint in its entirety, arguing that plaintiff lacks standing, and that her allegations cannot state an Establishment Clause claim on the merits in any event. Defendants have also moved to strike paragraph 40(c) of plaintiff's complaint, which alleges a prayer for "nominal damages in the sum of $100."

As part of their motion to dismiss, defendants have also filed a request for judicial notice, in which they request that the court judicially notice the website pages at issue – namely, the entire Museum

of Paleontology website, including the "Understanding Evolution" portion of the website.[2]

DISCUSSION

A. Legal Standards

A court will dismiss a claim under Fed. R. Civ. P. 12(b)(6) for failure to state a claim only where it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle the plaintiff to relief. *See, e.g., Broam v. Brogan*, 320 F.3d 1023, 1033 (9th Cir. 2003) (citations omitted). In evaluating a motion to dismiss, all allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. *See, e.g., Burgert v. Lokelani Bernice Pauahi Bishop Trust*, 200 F.3d 661, 663 (9th Cir. 2000) (citations omitted).

A court may also strike any "insufficient defense or any redundant, immaterial, impertinent or scandalous matter." Fed. R. Civ. Proc. 12(f). A motion to strike will be granted where plaintiff has made an improper demand or prayer for relief as a matter of

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[2] As the court noted at the hearing on the instant motions, both parties filed briefs in violation of Civil L.R. 3-4(c)(2), which requires that all footnotes be of the same font size as the body of the text. Accordingly, and in view of the violation, the court hereby STRIKES all footnotes cited in the parties' briefs, and declines to consider the substance of any content contained therein.

law. *See, e.g., Bureerong v. Uvawas,* 922 F. Supp. 1450, 1479 n.34 (C.D. Cal. 1996). Notwithstanding, motions to strike are regarded with disfavor because of the limited importance of pleadings in federal practice. *See, e.g., Colaprico v. Sun Microsystems,* 758 F. Supp. 1335, 1339 (N.D. Cal. 1996).

B. Motion to Strike

Defendants request that the court plaintiff's prayer for "nominal damages in the sum of $100." *See* Complaint at 15:1-2. They assert that Eleventh Amendment immunity applies to state officials like defendants, and limits the relief that may be awarded against them to prospective injunctive relief, specifically excluding damages awards that require payment of funds from the state treasury. In response, plaintiff contends that nominal damages have previously been upheld by federal courts against state actors, and that the Ninth Circuit has expressly "left the door open to the possibility" that nominal damages may be considered equitable – and therefore outside the confines of the Eleventh Amendment – in cases such as this one, where the primary remedies sought are equitable in nature.

Resolution of the instant motion depends on whether Eleventh Amendment immunity applies to defendants as state officials, and if so, whether it bars nominal damages under Ninth Circuit law.

Defendants are employees and officials of a state university. It is well-established that a state university – and UC Berkeley explicitly – is entitled to Eleventh Amendment immunity. *See, e.g., Thompson v. City of Los Angeles,* 885 F.2d 1439, 1443 (9th Cir. 1989) (noting the well-established rule that the UCs are "states" for Eleventh Amendment immunity purposes). It is equally well-established that state employees sued in their official capacity as state officials are also entitled to Eleventh Amendment immunity. *See Students for a Conservative Am. v. Greenwood,* 378 F.3d 1129, 1130 (9th Cir. 2004). This is the case here: plaintiff has sued defendants in their official capacities as state employees. Accordingly, since plaintiff has made no allegation that defendants have waived Eleventh Amendment immunity, the immunity applies.

Pursuant to that immunity, a request for monetary damages that would require payment from the state's general treasury fund is impermissible. *See Edelman v. Jordan,* 415 U.S. 651, 677 (1973). This would include – as is the case here – nominal damages. *See Taylor v. Westly,* 402 F.3d 924, 929-30 (9th Cir. 2005) (generally, Eleventh Amendment "shields state governments from money judgments in federal courts, and from declaratory judgments against the state governments that would have the *practical effect* of requiring the state treasury to pay money to claimants") (emphasis added).

Moreover, plaintiff's support to the contrary is unavailing. As defendants point out, each case cited

by plaintiff either involves a municipality as a defendant, or in the alternative, involves the United States as defendant in situations in which statutory provisions expressly allow for action to be taken against the Unites States. Neither of these factual scenarios is in evidence here. As such, plaintiff offers no authority demonstrating that the above prohibition on monetary damages – even if nominal – has been abrogated in circumstances such as those here.

Accordingly, defendants' motion to strike is GRANTED.

C. Motion to Dismiss

Defendants seek dismissal on two grounds. First, defendants assert that plaintiff lacks standing. Second, they assert that in the event standing exists, plaintiff's allegations nonetheless fail to state a claim for violation of the Establishment Clause on the merits. Plaintiff challenges both assertions.

1. Request for Judicial Notice

Prior to analyzing the merits of the above arguments, the court must first resolve defendants' request for judicial notice. Specifically, defendants seek to have judicial notice taken of the UC Berkeley Museum of Paleontology website, http://www.ucmp.berkeley.edu/museum/museum.php, including the Understanding Evolution portion of the site that is directly at issue (i.e., http://evolution.berkeley.edu/).

See Request for Judicial Notice in Support of Motion to Dismiss. Defendants assert that the website provides necessary context, and base their request on case law from the Central District of California holding that judicial notice of websites is proper, as well as Ninth Circuit authority stating that a document that is not a part of the complaint or record may be incorporated by reference if it is the source of plaintiff's complaint or plaintiff's complaint refers to it extensively. *See Wible v. Aetna Life Ins. Co.,* 375 F. Supp. 2d 956, 965 (C.D. Cal. 2005); *United States v. Ritchie,* 342 F.3d 903, 908 (9th Cir. 2003). Defendants have not attached a hard copy of any portion of the website to their request.

Generally speaking, a court must take judicial notice if a party requests it and supplies the court with the requisite information. *See* Fed. Rule Evid. 201(d). Furthermore, defendants are correct that although the general rule is that the court will look only to the four corners of the complaint, the court may look outside the complaint where the outside document has been referenced by, or relied on in the complaint itself. *See United States v. Ritchie,* 342 F.3d at 908. Defendants are also correct that the Central District of California has found websites to be a proper subject for judicial notice. *See, e.g., Wible v. Aetna Life Ins. Co.,* 375 F. Supp. 2d at 965.

The court agrees with the proposition that, as a general matter, websites and their contents may be proper subjects for judicial notice. However, the cases cited by defendants are distinguishable from the facts

here because in those cases, defendants appear to have supplied the court with hard copies of the actual web pages of which they sought to have the court take judicial notice. Indeed, Federal Rule of Evidence 201(d) generally contemplates that a party will provide the copy of the document it seeks to have judicially noticed. After all, the language of the rule provides that judicially noticeable facts are those which are "capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned." Fed. R. Evid. 201(b). Here, by contrast, without the actual web pages before it, the court is unable to pass on the nature of facts contained within the entire website, whose accuracy cannot be determined with reference to anything concrete. This is especially significant, given the changing and changeable nature of internet websites. Indeed, the parties' own arguments here bear out the importance of providing the court with the web pages for which judicial notice is sought. The parties cannot even agree on the actual content of the website at issue, and the only webpages in evidence are those submitted by plaintiff as an attachment to her complaint.[3]

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[3] At the hearing, the parties made competing arguments regarding the status of the Understanding Evolution website, and in particular whether defendants have altered the website since the filing of plaintiff's complaint. After the hearing, both parties submitted additional letters to the court on this same issue, each again arguing their respective positions as to whether factual changes have been made to the website at issue.

(Continued on following page)

Accordingly, the court finds that defendants' request for judicial notice is deficient for failure to comply with Rule 201. While the court agrees with defendants that they should not be required to submit an entire website as an exhibit, which might number several thousands of pages, at a minimum, defendants must provide the specific webpages upon which they will base their arguments and/or the specific pages which they claim provide the necessary context for their arguments.

Defendants' request is therefore DENIED, without prejudice.

2. Standing

To satisfy constitutional standing requirements, a plaintiff must prove that "(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000) (citing *Lujan v. Defenders of*

In view of the court's ruling on defendants' judicial notice request, as stated herein, the court does not consider these arguments either way on the question whether the Understanding Evolution website has materially changed, but references this dispute by way of illustration only.

Wildlife, 504 U.S. 555, 560-561 (1992); *Schmier v. U.S. Ct. of App. for Ninth Cir.,* 279 F.3d 817, 820-21 (9th Cir. 2002). In addition to these constitutional requirements, certain "prudential rules" have been crafted, which prohibit federal courts from being forums for hearing generalized grievances by taxpayers, and which allow for standing to be premised on a plaintiff's status as state or federal taxpayer only if certain requirements are met. *See Bell v. City of Kellogg,* 922 F.2d 1418, 1422 (9th Cir. 1991).

Defendants assert that plaintiff has no standing for the following reasons: (1) plaintiff fails to allege federal taxpayer standing; (2) plaintiff fails to allege state taxpayer standing; and (3) plaintiff fails to allege cognizable injury in fact.

a. federal taxpayer standing

The requirements for federal taxpayer standing are two-fold: first, the plaintiff taxpayer must establish a logical link between taxpayer status and the type of legislative enactment attacked. Second, the plaintiff taxpayer must establish a nexus between taxpayer status and the precise nature of the constitutional infringement alleged. *See, e.g., Flast v. Cohen,* 392 U.S. 83, 102-03 (1968); *Bell,* 922 F.2d at 1422. Under this two-pronged test, plaintiff may allege only the unconstitutionality of exercises of congressional power under the taxing and spending clause – it is not sufficient to allege an incidental expenditure of tax funds in the administration of an

essentially regulatory statute. *See Flast*, 392 U.S. at 102. The plaintiff must also show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power. *Id.*

Plaintiff's complaint fails to make those requisite allegations here. First, plaintiff nowhere alleges any type of qualifying "legislative enactment" or congressional act. Plaintiff alleges only that the Understanding Evolution website was funded in part by a $523,261 grant from the National Science Foundation ("NSF"), a federal entity. *See* Complaint at ¶¶ 14, 18. Plaintiff does not allege that the partial grant resulted from any type of direct congressional action. In sum, plaintiff's allegations amount to a complaint against the NSF's administrative decision to partially fund the Understanding Evolution website, not – as required – to a complaint against congressional action under the taxing and spending clause. As such, plaintiff's allegations are the essence of what *Flast* prohibits – taxpayer standing on the basis of an incidental expenditure of tax funds in the administration of an essentially regulatory statute.

Second, the "nexus" between plaintiff's taxpayer status and the nature of the alleged constitutional infringement is missing. Plaintiff does not allege any congressional involvement in the NSF's decision to provide partial funding for the Understanding Evolution website, or that the NSF merely acts as a vehicle to carry out Congress' orders and directives. These facts beg the same result as the holding in *Fordyce v.*

Frohnmayer, 763 F. Supp. 654 (D. D.C. 1991), a case cited by defendants. In *Fordyce,* the court rejected plaintiff's federal taxpayer standing claim because plaintiff alleged only that a grant and sponsorship from the National Endowment for the Arts violated the Establishment Clause. The court specifically found that the required "nexus" for federal taxpayer standing was missing because plaintiff was not alleging direct congressional involvement in the NEA's decision to partially fund the exhibition in question, and plaintiff's allegations amounted to no more than a challenge to a decision made solely by an agency of an executive branch. *See* 763 F. Supp. at 657.

Accordingly, the court finds that plaintiff has failed to allege federal taxpayer standing, and plaintiff's complaint cannot be supported on this ground.

b. state taxpayer standing

In response to defendants' argument that plaintiff similarly fails to allege state taxpayer standing, plaintiff asserts that she has alleged all elements necessary to plead state taxpayer standing: that she is a state taxpayer, and that "measurable sums of public funds are being used to further the actions of Defendants." Complaint at ¶¶ 9, 37.

The seminal state taxpayer standing case is *Doremus v. Board of Education,* 342 U.S. 429 (1952). In that case, the Supreme Court explained that a state taxpayer has standing when the taxpayer is

able to show that s/he "has sustained or is immediately in danger of sustaining some direct injury as the result of [the challenged conduct's] enforcement." *See* 342 U.S. at 434. The direct injury requirement is in turn established when the taxpayer brings a "good-faith pocketbook action" – i.e., when the challenged statute or conduct involves the "measurable appropriation or disbursement" of state tax revenues. *See id.*; *see also Cammack v. Waihee,* 932 F.2d 765, 769 (9th Cir. 1991); *Hoohuli v. Ariyoshi,* 741 F.2d 1169, 1178 (9th Cir. 1984) (pleadings must set forth the "relationship between taxpayer, tax dollars, and the allegedly illegal government activity").

In *Cammack,* state taxpayer standing was found where plaintiffs set forth their status as state taxpayers and specifically stated the amount of funds appropriated and allegedly spent by the taxing governmental entities as a result of the allegedly unconstitutional conduct. *See* 932 F.2d at 771. And in *Hoohuli,* state taxpayer standing was found where the taxpayers challenged the "appropriating, transferring, and spending. . . . of taxpayers' money from the General Fund of the State Treasury. . . . ," and where the plaintiffs' pleadings set forth with specificity amounts of money appropriated and spent for allegedly unlawful purposes. *See* 741 F.2d at 1180.

Here, by contrast, plaintiff's allegations fall short. Although plaintiff alleges she is a state taxpayer, she fails to allege any specific expenditure of state taxes in connection with the challenged website, let alone the specific amounts of state taxes at issue

(as was the case in both *Cammack* and *Hoohuli*). Plaintiff makes only the general allegation that there is "an identifiable sum of public funds being used to further the actions of the Defendants." This general statement, without more, fails to allege the necessary relationship between plaintiff, the state's expenditure of tax dollars, and the purportedly illegal government conduct occasioned by the Understanding Evolution website. Indeed, "public funds" could mean either state *or* federal taxes. Moreover, given that the only specific sum mentioned in plaintiff's complaint is the $523,261 NSF grant, it is implausible that plaintiff's allegation as to "public funds" and "specific tax dollars" can even be read to refer to state tax dollars.

Accordingly, for the reasons above, the court finds that plaintiff fails to sufficiently allege state taxpayer standing.

c. cognizable injury in fact

Article III standing requires that plaintiff plead a concrete "injury in fact" – i.e., some actual or threatened injury as a result of the purportedly illegal conduct of defendant. *See Valley Forge Christian College v. Am. United for Separation of Church & State,* 454 U.S. 464, 472 (1982). Plaintiff asserts that under Ninth Circuit authority, she need only allege that she came into "direct and unwelcome contact with government-sponsored religious messages that were contrary to her beliefs in a government owned and operated public facility." *See* Opp. Br. at 11:10-17.

Defendants, on the other hand, assert that plaintiff alleges only "psychological injury" stemming from her observation of the website, and that something more than this is required under *Valley Forge.*

In *Valley Forge,* plaintiffs challenged a congressional act that allowed for the transfer of used government property to non-profit, tax-exempt educational institutions, including religious based institutions. The Supreme Court used the case to set forth an exhaustive discussion on standing requirements in the Establishment Clause context, and specifically addressed the "injury in fact" requirement. In determining that no standing existed where plaintiffs alleged "the deprivation of the fair and constitutional use of their tax dollar," the *Valley Forge* court reiterated its prohibition on standing claims that are predicated on "the right, possessed by every citizen, to require that the government be administered according to law . . . ". *See* 454 U.S. at 482-83. The court then went on to state: "Although respondents claim that the Constitution has been violated, they claim nothing else. They fail to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing . . . even though the disagreement is phrased in constitutional terms." *See id.* at 485-86. The court simultaneously reiterated that standing may nonetheless be based on noneconomic injury. *Id.*

Here, plaintiff alleges that the injury she suffered was in being "offended" by viewing the website, feeling like an "outsider," and "being exposed to the government endorsed religious messages," to her harm. *See* Complaint at ¶ 26. On their face, these allegations fall directly within *Valley Forge*'s prohibition on standing where a plaintiff alleges only a "psychological consequence" produced "by observation of conduct with which one disagrees." As such, plaintiff's allegations state only a generalized grievance against defendants, and are insufficient to confer injury in fact.

Moreover, plaintiff's contrary arguments are unpersuasive. To begin with, plaintiff's reliance on four Ninth Circuit cases upholding citizen standing is misplaced. *See Separation of Church & State Comm. v. City of Eugene,* 93 F.3d 617, 619 n.2 (9th Cir. 1996); *Am. Jewish Congress v. City of Beverly Hills,* 90 F.3d 379, 381-82 (9th Cir. 1996); *Ellis v. City of La Mesa,* 990 F.2d 1518, 1523 (9th Cir. 1993); *Buono v. Norton,* 371 F.3d 543 (9th Cir. 2004). Without fail, each of these cases deals with a factual scenario in which plaintiffs' alleged injuries stemmed from the inability to use a public or municipal park because of an overt religious symbol or message placed in the public park. While plaintiff understandably seeks to analogize this case to those cases, contending that the "public" nature of the Understanding Evolution website compels a similar result, such an analogy is untenable.

First, there is a vast difference between a citizen's inability to use a public park due to the presence of an overtly religious symbol, and a citizen's viewing of a purportedly offensive website. For example, a citizen who voluntarily chooses to access a public park and comes upon an overtly religious symbol may well be prevented from utilizing and enjoying the whole of the park by virtue of the unwelcome message. By contrast, a citizen voluntarily choosing to access the internet who comes across an unwelcome message on a website page is not necessarily prevented from accessing the whole of the internet; the citizen may choose, with a simple click of the mouse, to access a different and unoffensive webpage or website.

Moreover, the unique nature of the internet cannot be overlooked. It is a vehicle for communication that is not capable of ready analogy to any other. The internet contains millions upon millions of websites and webpages, spanning a limitless number of subjects and target audiences. It is in daily use by millions, all of whom decide on a voluntary basis (for the most part) which websites and webpages to access. Given this massive appeal and impossibly broad spectrum, it is simply inconceivable that the mere viewing of certain webpages that do no more than make plaintiff feel "offended" and like an "outsider" is sufficient to give rise to injury in fact standing. If this were so, then every webpage on the internet could give rise to a claim, simply based on an individual's negative emotional response to that

webpage. This is particularly significant, when one considers that the very nature of certain websites and webpages is to be provocative, and to risk offence. This cannot be what was contemplated by either the Supreme Court or the Ninth Circuit when those courts issued the decisions referred to above.

In sum, the court finds that plaintiff has done no more than to allege a generalized grievance that is insufficient to establish "injury in fact" standing. Accordingly, in view of the fact that each of plaintiff's arguments in favor of standing fails, the court GRANTS defendants' motion to dismiss plaintiff's complaint on the grounds that plaintiff lacks standing.[4]

3. Establishment Clause Merits

In view of the above holding, the court need not, and does not, reach the parties' arguments on the

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[4] At the hearing on the instant motions, plaintiff's counsel suggested for the first time that discovery is necessary in order to ascertain whether facts that support standing exist. Plaintiff did not cite to any authority for this proposition, nor is the court aware of any. Indeed, the Ninth Circuit has expressly affirmed the district court's right to decide the standing issue at the pleading stage, as opposed to the summary judgment stage, which takes into account facts established through discovery. *See, e.g., Schmier v. United States Ct. of App. for Ninth Cir.*, 279 F.3d 817, 823-24 (9th Cir. 2002) (holding no error by district court "in deciding the standing issue at the pleading stage") ("th[e] injury element most assuredly remains the proper basis of a motion brought under Fed. R. Civ. P. 12(b)(6)").

merits of the Establishment Clause claim. This conclusion is further buttressed by the fact that the court, as described above, is currently unable to take judicial notice of defendants' website. As such, the court does not have access to what defendants argue is the necessary and relevant context in which to evaluate plaintiff's claim.

Accordingly, consideration on the merits is premature at this juncture, and is better suited to resolution if and when the case is again before this court.

D. Conclusion

For the above reasons, the court GRANTS defendants' motion to strike, DENIES without prejudice defendants' request for judicial notice, and GRANTS defendants' motion to dismiss with prejudice for lack of plaintiff's standing.

IT IS SO ORDERED.

Dated: March 13, 2006

/s/ Phyllis J. Hamilton
PHYLLIS J. HAMILTON
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JEANNE E. CALDWELL,

Plaintiff,

v.

ROY L. CALDWELL, PH.D, et al.,

Defendants.

/

No. C 05-4166 PJH

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS AND VACATING HEARING DATE

(Filed Mar. 20, 2006)

Before this court is the federal defendants' motion to dismiss for lack of jurisdiction and failure to state a claim upon which relief can be granted. Having carefully read the parties' papers and considered the relevant legal authority, the court hereby GRANTS the motion to dismiss for the reasons that follow.[1]

[1] The court finds this motion appropriate for decision without oral argument as permitted by Civil L.R. 7-1(b) and Fed. R. Civ. P. 78. *See also Lake at Las Vegas Investors Group, Inc. v. Pacific Malibu Dev. Corp.*, 933 F.2d 724, 729 (9th Cir. 1991) (holding that the court's consideration of the moving and opposition papers is deemed an adequate substitute for a formal hearing), *cert. denied,* 503 U.S. 920 (1992). Accordingly, the March 22, 2006 hearing date is hereby VACATED.

BACKGROUND

A. Facts

Plaintiff is the mother of three and a resident of Placer County, California. Two of her children currently attend public school in Placer County. On October 14, 2005, plaintiff filed the instant complaint against defendants Roy Caldwell and David Lindberg (the "state defendants") and the National Science Foundation ("NSF") and its officials (the "federal defendants"), in which she takes issue with a website published by the University of California, http://evolution.berkeley.edu (the "Understanding Evolution" website).[2] The website, which plaintiff alleges was made possible through a federal grant provided by the NSF in the amount of $523,261, is part of a larger website maintained by the UC Berkeley Museum of Paleontology. *See* Complaint for Declaratory and Injunctive Relief and Nominal Damages for Violation of the Establishment Clause of the First Amendment to the United States Constitution ("Complaint"), ¶ 18. Its purpose is to educate teachers and the general public about the science and history of evolutionary biology. *See* Opening Br. at 1:14-18.

Plaintiff alleges that the Understanding Evolution website contains certain web pages that operate to impermissibly endorse, advance and proselytize

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[2] Defendants, for the purposes of the instant motion, are the National Science Foundation ("NSF"), a federal agency, and relevant NSF officials ("federal defendants").

certain religious beliefs. In particular, plaintiff alleges that the website pages endorse the following: (1) the religious doctrine that religion and religious beliefs are limited to the spiritual and supernatural world; (2) the religious doctrine that the theory of evolution is not in conflict with properly understood Christian or Jewish religious beliefs; (3) content contained on a link from the website to the National Center for Science Education ("NCSE"), which contains seventeen doctrinal statements on the theory of evolution in support of the website's theory that evolution is not in conflict with many Christian and Jewish religions; and (4) the religious beliefs and religious viewpoints advocated by the NCSE, including the seventeen statements just referenced. *See* Complaint, ¶ 24.

As a result of this endorsement, plaintiff alleges that the government violates the First Amendment Establishment Clause by setting up a preference for certain religious groups over others – i.e., for those groups who are not in conflict with evolution over those who are. *See id.* at ¶ 29. Plaintiff asserts this violation has caused her to suffer injury, because she is "offended" when she views the website, and made to feel like an "outsider." *Id.* at ¶ 26.

B. Procedural History

On February 8, 2006, the state defendants moved to dismiss plaintiff's complaint in its entirety, arguing that plaintiff lacks standing, and that her allegations cannot state an Establishment Clause claim on

the merits in any event. On March 13, 2006, the court granted the state defendants' motion to dismiss for lack of standing with prejudice, and in view of that holding, declined to address the viability of plaintiff's Establishment Clause claim.

The federal defendants now move to dismiss plaintiff's complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6). In support thereof, the federal defendants reiterate the same arguments raised by the state defendants in their prior motion: first, that plaintiff lacks standing. Second, that in the event standing is found, plaintiff's Establishment Clause claim fails on the merits.[3]

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[3] The federal defendants have also filed a request for judicial notice, in which they request that the court judicially notice two sets of webpages at issue. The first consists of an overview and site description for the Understanding Evolution website. *See* Federal Defendants' Request for Judicial Notice, Ex. A. The second consists of a description of the National Center for Science Education's mission, along with the "voices for evolution" webpage (sponsored by the NCSE) which plaintiff refers to in Exhibit 2 to her complaint. *See id.* at Ex. B. Unlike a similar request made by the state defendants, the federal defendants here actually provide the court with the webpages they seek to have the court take judicial notice of, as well as proper Ninth Circuit authority. Accordingly, the federal defendants' request for judicial notice is GRANTED.

DISCUSSION

A. Legal Standards

The plaintiff bears the burden of demonstrating that subject matter jurisdiction exists over the complaint when challenged under Fed. R. Civ. P. 12(b)(1). *See, e.g., Tosco Corp. v. Communities for a Better Env't,* 236 F.3d 495, 499 (9th Cir. 2001). Plaintiff also bears the burden of demonstrating that she has standing to pursue the claims alleged in the complaint. *See United States v. Hays,* 515 U.S. 737, 743 (1995) (burden on plaintiff "clearly to allege facts demonstrating that [plaintiff] is a proper party to invoke judicial resolution of the dispute"). Here, since the defendants challenge subject matter jurisdiction on the face of the complaint, all allegations of the complaint are taken as true and all disputed issues of fact are resolved in favor of the non-moving party. *See Love v. United States,* 915 F.2d 1242, 1245 (9th Cir. 1990).

Dismissal under Fed. R. Civ. P. 12(b)(6), by comparison, is warranted only where it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle the plaintiff to relief. *See, e.g., Broam v. Bogan,* 320 F.3d 1023, 1033 (9th Cir. 2003) (citations omitted). In evaluating a motion to dismiss, all allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. *See, e.g., Burgert v. Lokelani Bernice Pauahi Bishop Trust,* 200 F.3d 661, 663 (9th Cir. 2000) (citations omitted).

B. Standing

To satisfy constitutional standing requirements, a plaintiff must prove that "(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992)); *Schmier v. U.S. Ct. of App. for Ninth Cir.*, 279 F.3d 817, 820-21 (9th Cir. 2002). In addition to these constitutional requirements, certain "prudential rules" have been crafted, which prohibit federal courts from being forums for hearing generalized grievances by taxpayers, and which allow for standing to be premised on a plaintiff's status as state or federal taxpayer only if certain requirements are met. *See Bell v. City of Kellogg*, 922 F.2d 1418, 1422 (9th Cir. 1991).

As the state defendants argued in their earlier motion, the federal defendants here assert that plaintiff has no standing because (1) plaintiff fails to allege federal taxpayer standing; and (2) plaintiff fails to allege cognizable injury in fact. As explained below, the federal defendants prevail on both

arguments, for the same reasons as did the state defendants.[4]

1. Federal Taxpayer Standing

The requirements for federal taxpayer standing are two-fold: first, the plaintiff taxpayer must establish a logical link between taxpayer status and the type of legislative enactment attacked. Second, the plaintiff taxpayer must establish a nexus between taxpayer status and the precise nature of the constitutional infringement alleged. *See, e.g., Flast v. Cohen,* 392 U.S. 83, 102-03 (1968); *Bell,* 922 F.2d at 1422. Under this two-pronged test, plaintiff may allege only the unconstitutionality of exercises of congressional power under the taxing and spending clause – it is not sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute. *See Flast*, 392 U.S. at 102. The plaintiff must also show that the challenged enactment exceeds specific constitutional limitations

[4] The federal defendants prevail on their arguments for the additional reason that plaintiff failed to submit a proper opposition to defendants' motion to dismiss. Not only did plaintiff file her opposition more than one week late, plaintiff's opposition fails to address the substance of any argument made by the federal defendants, stating instead in summary fashion that plaintiff intends to file an amended complaint curing all deficiencies. As such, the court finds that the plaintiff's untimely opposition constitutes a statement of non-opposition to plaintiff's motion.

imposed upon the exercise of the congressional taxing and spending power. *Id.*

Plaintiff fails on both counts here. First, as the court stated in its prior order, plaintiff nowhere alleges any type of qualifying "legislative enactment" or congressional act. Plaintiff alleges only that the Understanding Evolution website was funded in part by a $523,261 grant from the National Science Foundation ("NSF"), a federal entity. *See* Complaint at ¶¶ 14, 18. Plaintiff does not allege that the grant resulted from any type of direct congressional action. Nor could she, since as the federal defendants' supporting declaration makes clear, the NSF grant was administered by NSF personnel in response to a solicitation process that was independent of any congressional action, and which has no direct link to the general appropriations that Congress makes to the various NSF directorates. *See* Declaration of David Campbell, Ph.D. ("Campbell Decl."), ¶ 8. In sum, plaintiff's allegations amount to no more than a complaint against the NSF's administrative decision to partially fund the Understanding Evolution website, and not – as required – to a complaint against direct congressional action under the taxing and spending clause.

Second, the "nexus" between plaintiff's taxpayer status and the nature of the alleged constitutional infringement is missing. As the federal defendants point out in their opening brief, plaintiff does not allege any congressional involvement in the NSF's

decision to provide partial funding for the Understanding Evolution website, or that the NSF merely acts as a vehicle to carry out Congress' orders and directives. *See* Opening Br. at 11:9-13.

As the court stated in its prior order, these facts beg the same result as the holding in *Fordyce v. Frohnmayer,* 763 F. Supp. 654 (D. D.C. 1991). In *Fordyce,* the court rejected plaintiff's federal taxpayer standing claim because plaintiff alleged only that a grant and sponsorship from the National Endowment for the Arts violated the Establishment Clause. The court specifically found that the required "nexus" for federal taxpayer standing was missing because plaintiff was not alleging direct congressional involvement in the NEA's decision to partially fund the exhibition in question, and plaintiff's allegations amounted to no more than a challenge to a decision made solely by an agency of an executive branch. *See* 763 F. Supp. at 657.

Accordingly, as it held with respect to the state defendants, the court holds that plaintiff has failed to allege federal taxpayer standing, and plaintiff's complaint cannot be supported on this ground.

2. Injury In Fact Standing

Article III standing requires that plaintiff plead a concrete "injury in fact" – i.e., some actual or threatened injury as a result of the purportedly illegal conduct of defendant. *See Valley Forge Christian College v. Am. United for Separation of Church &*

State, 454 U.S. 464, 472 (1982). The federal defendants argue that plaintiff's allegations constitute no more than the generalized grievances of a mere "interested bystander," and that under *Valley Forge,* standing is therefore lacking.

The federal defendants are correct. In *Valley Forge,* plaintiffs challenged a congressional act that allowed for the transfer of used government property to non-profit, tax-exempt educational institutions, including religious based institutions. The Supreme Court used the case to set forth an exhaustive discussion on standing requirements in the Establishment Clause context, and specifically addressed the "injury in fact" requirement. In determining that no standing existed where plaintiffs alleged "the deprivation of the fair and constitutional use of their tax dollar," the *Valley Forge* court reiterated its prohibition on standing claims that are predicated on "the right, possessed by every citizen, to require that the government be administered according to law . . . ". *See* 454 U.S. at 482-83. The court then went on to state: "Although respondents claim that the Constitution has been violated, they claim nothing else. They fail to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing . . . even though the disagreement is phrased in constitutional terms." *See id.* at 485-86.

The court simultaneously reiterated that standing may nonetheless be based on noneconomic injury. *Id.*

Here, as the court stated in its prior order on the state defendants' motion to dismiss, plaintiff's allegations that she was "offended" by the website at issue and made to feel like an "outsider," fall directly within *Valley Forge*'s prohibition on standing where a plaintiff alleges only a "psychological consequence" produced "by observation of conduct with which one disagrees." *See* Complaint at ¶ 26. As such, plaintiff's allegations state only a generalized grievance against defendants, and are insufficient to confer injury in fact.

The court also finds that no injury in fact standing is present for all the reasons set forth in its prior order of March 13, 2006, and it hereby incorporates that order by reference.

Accordingly, in view of the fact that each of plaintiff's arguments in favor of standing fails, the court GRANTS the federal defendants' motion to dismiss plaintiff's complaint on the grounds that plaintiff lacks standing.

C. Establishment Clause Claim

As the court indicated in its prior order, in view of its finding that plaintiff lacks standing, the court need not, and does not, reach the merits of the Establishment Clause claim.

D. Conclusion

For the above reasons, the court GRANTS the federal defendants' motion to dismiss, with prejudice, for lack of plaintiff's standing. The court notes that plaintiff has essentially had three opportunities – first with the state defendants, then in a later filed administrative motion requesting clarification of the court's prior order, and now in opposition to the federal defendants' motion – to articulate which additional facts she would or could add to her complaint in order to bolster her standing arguments. Yet all that plaintiff has articulated, as set forth most concretely in plaintiff's administrative motion, are the addition of two allegations stating (1) that defendants' website is aimed at the general public; and (2) that defendants have "expressly invited members of the general public to visit and use the website." *See* Motion for Admin. Relief Regarding Clarification of Court's March 13, 2006 Order at 2:9-10. As the court sets forth in its Order on Administrative Motion and Granting Clarification (filed concurrently herewith), these proposed allegations do *not* support federal taxpayer standing. Therefore, any proposed amendment would be futile, and the court's dismissal is with prejudice.

IT IS SO ORDERED.

Dated: March 20, 2006

/s/ Phyllis J. Hamilton
PHYLLIS J. HAMILTON
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

JEANNE E. CALDWELL,

Plaintiff,

v.

ROY L. CALDWELL, PH.D., in his official capacity as Director of the University Of California Museum Of Paleontology; DAVID LINDBERG, in his official capacity as Chair of the Integrative Biology Department of the University of California-Berkeley; MICHAEL D. PIBURN, in his official capacity as Program Director for the National Science Foundation.

Defendants.

CASE NO. C05-04166

COMPLAINT: CLAIM FOR DECLARATORY AND INJUNCTIVE RELIEF AND NOMINAL DAMAGES FOR VIOLATION OF THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION

[42 U.S.C. § 1983]

[Demand for Jury Trial]

COMPLAINT

(Filed Oct. 14, 2005)

* * *

EXHIBIT 2

Misconception: "Evolution and religion are incompatible."

Response: Religion and science (evolution) are very different things. In science (as in science class), only natural causes are used to explain natural phenomena, while religion deals with beliefs that are beyond the natural world.

The misconception that one has to choose between science and religion is divisive. Most Christian and Jewish religious groups have no conflict with the theory of evolution or other scientific findings. In fact, many religious people, including theologians, feel that a deeper understanding of nature actually enriches their faith. Moreover, in the scientific community there are thousands of scientists who are devoutly religious and also accept evolution.